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Supreme Court of the United States.

Office Supreme Court U. S.
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AUG 25 1903
JAMES H. McKENNEY,
Clerk.

OCTOBER TERM, 1903.

No. 105. 109.

THE BUTTE CITY WATER COMPANY, PLAINTIFF IN ERROR,

vs.

BEN BAKER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

MOTIONS TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT OF SAME.

ROBERT B. SMITH,
Attorney for Defendant in Error.

J. E. HEALY,
Of Counsel.

(19,056.)

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 405.

THE BUTTE CITY WATER COMPANY, PLAINTIFF IN ERROR,

vs.

BEN BAKER, DEFENDANT IN ERROR.

MOTIONS TO DISMISS OR AFFIRM.

I.

Motion to Dismiss.

Comes now Ben Baker, the defendant in error above named, and appearing by his counsel, Robert B. Smith, respectfully moves to dismiss the writ of error and all proceedings in aid thereof on the following grounds:

(a.) Because no Federal question appears by the record herein to have been made or saved in the State court by special reference or necessary intendment; nor was such Fed-

eral question specially set up or claimed; nor was any right under any named provision of Federal law denied; nor was any section or provision of Federal law relied upon or specially set forth or quoted as the basis of any right which was denied; nor was any provision of Federal law quoted upon which any discussion by the parties or decision by the court of the State could be had so as to determine whether or not any Federal right was claimed or denied.

(*b.*) Because no showing is made or attempted to be made whereby any decision of the State court denied the validity of any Federal law or statute or right claimed thereunder, but, on the contrary, it is conceded that all Federal laws were given full force and valid operation, the only question sought to be raised—not directly, but by inference—being whether or not any legislation regarding the location and recordation of mining claims can be enacted by the State legislatures "*additional*" to Federal laws. It is nowhere specified in the record that there is any conflict with Federal laws nor any provision of Federal law.

(*c.*) Because the Federal question attempted to be raised in the State court and therein attempted to be specified is abandoned in this court—that is to say, in the State court the only attempt to refer to a Federal question is contained in the appellant's specification of error No. 3, on page 6 of its brief in the State court, as follows:

"3. The court erred in excluding the location of defendant's Keyno claim. See statement heretofore 1, 5, and 6."

The statement thus referred to says:

"The appellant contends that by this ruling a Federal question was raised, to wit: as to whether the statutes of the State can impose upon the miner in locating a claim the additional burden laid upon him by section 3612 of the Political Code.

"The appellant desires to raise this Federal question, and contends that its decision is necessary to a determination of the case. The question is raised by specification VI."

Specification VI thus referred to, *totidem verbis*, is:

"The court erred in refusing to admit in evidence the notice of location of the Keno quartz lode mining claim offered in evidence by the defendant and objected to by the plaintiff, which said notice of location is in words and figures as follows:

This notice of location will be found in the record herein at page 38.

The objection made to this location notice was that it did not contain a statement of the dimensions and location of the discovery shaft or its equivalent upon the said lode mining claim as required by sec. 3612 of the Political Code, whereas there was no necessity that the notice should contain such statement for the reason that this requirement of the statute imposes a burden upon locators of mining claims additional to that imposed by the mining laws of the United States, and the legislature is without authority to require such statement."

It will be seen from the foregoing literal quotations from the record in the State court (being all there is in the record even remotely referring to a Federal question) that the only question sought to be raised in the State court was as to a requirement of the State law relating to the description of

the discovery work in a notice of location; not a declaratory statement, as provided for by section 3612, Political Code.

No complaint was made as to the other requirements of State law, such as the *doing* of discovery work upon the ground or the marking of corners or the like. These requirements of State law were not attacked and were therefore admitted to be valid; the only complaint made was as to the requirement regarding the description in a notice of location of the discovery work or its equivalent. This question is not made the subject of complaint in the assignments of error filed upon this writ of error, and, besides, this specification VI, above quoted, does not correctly state the numerous objections urged by Baker to the evidence offered—the declaratory statement of the alleged Keno lode. The only question attempted to be assigned in the State court is therefore abandoned here.

(*d.*) Because the errors herein attempted to be assigned were not raised in the State court. (Please see quotations herein made in subdivision *c.*)

(*e.*) Because the questions herein involved pertain to matters of purely local law, rules, and regulations made in pursuance of direct Federal law (sections 2322 to 2324, Revised Statutes), and do not involve any presentation or discussion of any provision of Federal law, nor is there pointed out now, either directly or specially or by inference, nor was it pointed out in the State court any way or manner wherein the State laws conflict with or contravene the provisions (general or specific) of any Federal law, or right claimed thereunder, or authority exercised thereunder, the

only attempted claim being that the State laws requiring a description of the discovery work are "additional" to some Federal law.

(Please note quotations hereinbefore made.)

(*f.*) Because the action herein sought to be reviewed was purely one in ejectment under State laws and practice and was not maintained under any provision of Federal law, and over this action the State courts had exclusive jurisdiction.

(*g.*) Because the matters and things herein attempted to be complained of involve matters of fact and questions of evidence as to the manner of proving facts in the State court, and that over such methods of proof and questions of adjective law the State has exclusive control, neither this court nor Congress having any authority to fix methods of pleading or proof in the State courts, and no contravention of any Federal law is made by adopting just and reasonable rules of evidence and methods of procedure and proof, of which all persons affected have due notice, and which requirements bear upon all alike, the reasonableness, justice, and fairness of such rules of procedure and evidence being in the discretion and power of the people of the State, acting through their legislature, and due process of law and the equal protection of the laws being accorded to all persons, without any favor or discrimination.

II.

Motion to Affirm.

And the defendant in error, by his counsel aforesaid, also *moves to affirm* the judgment of the supreme court of the State of Montana for the reason that although the record may show that this court has jurisdiction, it is manifest that the writ of error has been taken for delay only, and that the questions attempted to be presented to this court are so frivolous that no further argument or presentation thereof is necessary.

Very respectfully submitted.

ROB'T B. SMITH,
Attorney for the Defendant in Error.

Due service of the foregoing admitted and copy received this 29th day of July, 1903.

FORBIS & EVANS,
Attorneys for the Plaintiff in Error.

[Endorsed:] File No. 19,056. Supreme Court U. S. October term, 1903. Term No. 405. The Butte City Water Co., pl'ff in error, *vs.* Ben Baker. Motions to dismiss or affirm and acceptance of service of same. Filed August 25th, 1903.

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1903.

BUTTE CITY WATER COMPANY, *Plaintiff in Error*,
versus
BEN BAKER, *Defendant in Error*. } No. 405.

BRIEF OF DEFENDANT IN ERROR ON MOTIONS TO DISMISS OR AFFIRM.

In view of the quotations contained in subdivision (c) of the motions to dismiss or affirm (being all there is in the record showing the raising of a Federal question), it is not deemed necessary to here repeat the manner in which a Federal question was attempted to be raised; it is urged, however, that no proper, definite, or special setting up of a Federal right was made in the State court, and that the question attempted to be raised, by inference and argument, does not contain a Federal question, even if properly raised and asserted.

I.

No Definite Federal Question was Set Forth.

In order to comply with the provisions of section 709, Revised Statutes, it is necessary to specially claim a Federal right.

"It is well settled in this court that it must be made to appear that some *provision* of the Federal, as distinguished

from the State, Constitution was relied upon, and that such provision *must be set forth*."

New York Cent. & H. R. Co. *vs.* City of New York, 186 U. S., 273.

"We think these *general* allegations fall short of that *definite* claim of a right or title under a statute of the United States, which section 709 requires."

Speed *vs.* McCarthy, 181 U. S., 275.

And to the same effect are—

Shoshone Mg. Co. *vs.* Rutter, 177 U. S., 505.
Telluride Power Co. *vs.* R'y Co., 175 U. S., 639.
De Lamar Co. *vs.* Nesbitt, 177 U. S., 524.

"To raise a Federal question the right must be one claimed under a *particular* statute of the United States the validity, construction or applicability of which was made the *subject of dispute in the State court*."

De Lamar *vs.* Nesbitt, *supra*.

The mere possible *consideration* or reference to Federal law in the State court is not sufficient to raise a Federal question.

Beals *vs.* Cone,	No. 7	Adv. Sh'ts, 275.
Jacobi *vs.* Alabama,	No. 2	48.
Home for Incurables, etc.,	No. 3	84.
Telluride Co. *vs.* R'y Co.,	No. 5	179.

The application of the foregoing authorities to the case at bar is very readily apparent. It is impossible to take the record in this case and find any definite claim made by the plaintiff in error under any provision of Federal law.

And, while the decision of the State court (Baker *vs.* Water Co., 72 Pac., 617) holds generally in favor of the validity of the State laws, this holding must be considered in the light of the particular question presented by the record to the State court, which was not the construction of any particular provision of Federal law, but was the construction of a State law "additional" to some unnamed—and to the defendant in error unknown—provision of Federal law. Certainly it cannot be contended that anything in the way of a definite or special setting up of Federal right was made in the State court. It is true that some glittering generalities were indulged in, but *how* any Federal provision was involved, *how* any State law contravened any provision of Federal law by being *in addition* to Federal law, was not pointed out, and, not having been presented or set forth or discussed, is not even remotely apprehended by the defendant in error. It would seem that the deficiencies, confessedly existing in the record, are sought to be supplied by the assignments of error filed in support of the petition in error herein, and that therein (assignment V) it is sought to be urged that the provisions of section 2323, Revised Statutes, are *exclusive* as to what a record of a mining claim shall contain, and that no other requirements can be exacted, and that any other requirements, if exacted, are contrary to express Federal law. If this contention be the one sought to be urged, and this is a matter of conjecture on the part of the defendant in error, then it is respectfully submitted that neither a Federal nor any other kind of question is raised, and that the record presented to the State court was such as did not raise this

question. No provision of Federal law was set forth, quoted, or claimed.

Jacobi *vs.* Alabama.

Home for Incurables *vs.* New York.

Telluride Power Co. *vs.* Rio Grande Co., *supra.*

The *review* of the State court could extend no further than the question presented to it, that contained in specification VI in the errors of law, specified in the statement on motion for new trial. This, at best, is a generalization of opinion regarding a question of law of Montana, without any fair compliance, or pretense of compliance, with the provisions of section 709, Revised Statutes, and is far from sufficient to confer jurisdiction upon this court.

II.

Without conceding in any way the jurisdiction of this court, either under the assignments of error in this court or under the assignments of error in the State court, the inquiry may be made, "Does the question sought by intendment to be presented to this court constitute a Federal question?" As we understand the contentions intimated in the assignment of errors filed in support of the writ of error herein, they go upon the idea that no legislation can be enacted by the States in addition to the legislation enacted by Congress with regard to the location or recordation of mining claims; that the legislation of Congress upon the topic is exclusive of any State or local legislation; this upon the idea that section 1851, Revised Statutes, prevents any State, local, or territorial legislation relating to the "primary disposal of the

soil." In the first place, the record in this case is insufficient to present this question, and, in the second place, we hardly consider it seriously debatable in the light of the decisions of this court and the State and territorial courts.

So long have State and local regulations been recognized, either expressly or by implication in this court, that they have become a rule of property under which mining titles have been perfected and under which rights have grown up.

The statutes of the United States (sections 2322–'3–'4, Rev. Statutes) give full recognition to local and State rules and regulations, seemingly recognizing that under mining laws everywhere such local rules have ever existed where mining has been carried on.

Lindley on Mines (2d edition), sections 1 to 25.

A very full and learned discussion of the different sections of the laws of the United States bearing upon the mining industry (so far as the question in hand is concerned) is given by Chief Justice McConnell, of the supreme court of Montana, in O'Donnell *vs.* Glenn, 19 Pacific, 305 and 306, and, while not quoting the same at length, we submit that the reasoning is clear and convincing.

The same principles have been adhered to in Baker *vs.* Water Company, 72 Pac., 617, and cases cited there.

Beside this, this court has repeatedly held with our own supreme court on the same topic.

Jackson *vs.* Roby, 109 U. S., 440.
Erhardt *vs.* Boaro, 113 U. S., 527.
Shoshone Mg. Co. *vs.* Rutter, 177 U. S., 505.
Telluride Co. *vs.* R'y Co., 175 U. S., 639.
De Lamar Co. *vs.* Nesbitte, 177 U. S., 524.
Speed *vs.* MacCarthy, 181 U. S., 275.
Blackburn *vs.* Portland Mining Co., 175 U. S., 571.

In the light of the decisions of this court, it is not thought necessary to defend the State laws of Montana, nor to enter into any extensive discussion for the purpose of showing the reasons which brought about the change in the laws of the State of Montana, adopted July 1, 1895 (sections 3610 to 3616, Political Code). Suffice it to say that the necessity for such change was apparent to the people of the State, and the act might well have been termed "An act to require more exactness in locating mining claims, requiring good-faith locations thereof to be made, requiring reasonable exactness of description thereof, as to the location of permanent monuments and natural objects, preventing 'floating locations,' and to prevent frauds and perjuries in the location of mining claims."

The act was modeled after the Colorado law in the main, and was not adopted in Montana very long before it was copied in Nevada.

Sissons *vs.* Sommers, 55 Pac., 829.

Purdum *vs.* Laddin, 59 Pac., 153.

As stated in the Nevada case, the case of Erhardt *vs.* Boaro is all-sufficient as authority upon the power of the States to adopt such additional legislation and to require rules and regulations in addition to the laws of the United States.

Beside, the matter is purely a question of evidence as to the manner of proving facts in State courts, and any reasonable rule of evidence enacted by State law must be complied with in such court. Any other holding would be subversive of recognized State rights and the jurisdiction of State tribunals. Of course, we are not to be understood as arguing that unreasonable or arbitrary rules of evidence

giving favored persons unequal rights would not come within the provisions of the Federal Constitution relating to the equal protection of the laws. This phase of the question has no place before this court now, for no such contention is made, as we understand; but if it were made, it could have no force, for the rules of evidence adopted by the State of Montana are just and reasonable and apply to all alike.

As stated in our motion for dismissal, the objections made and sustained to the declaratory statement of the alleged Keno lode were such as would be good under any rules of evidence whatever, under the laws of the United States, even, and regardless of State laws; but we do not apprehend that it will be necessary to discuss this phase of the case, in the light of the record herein.

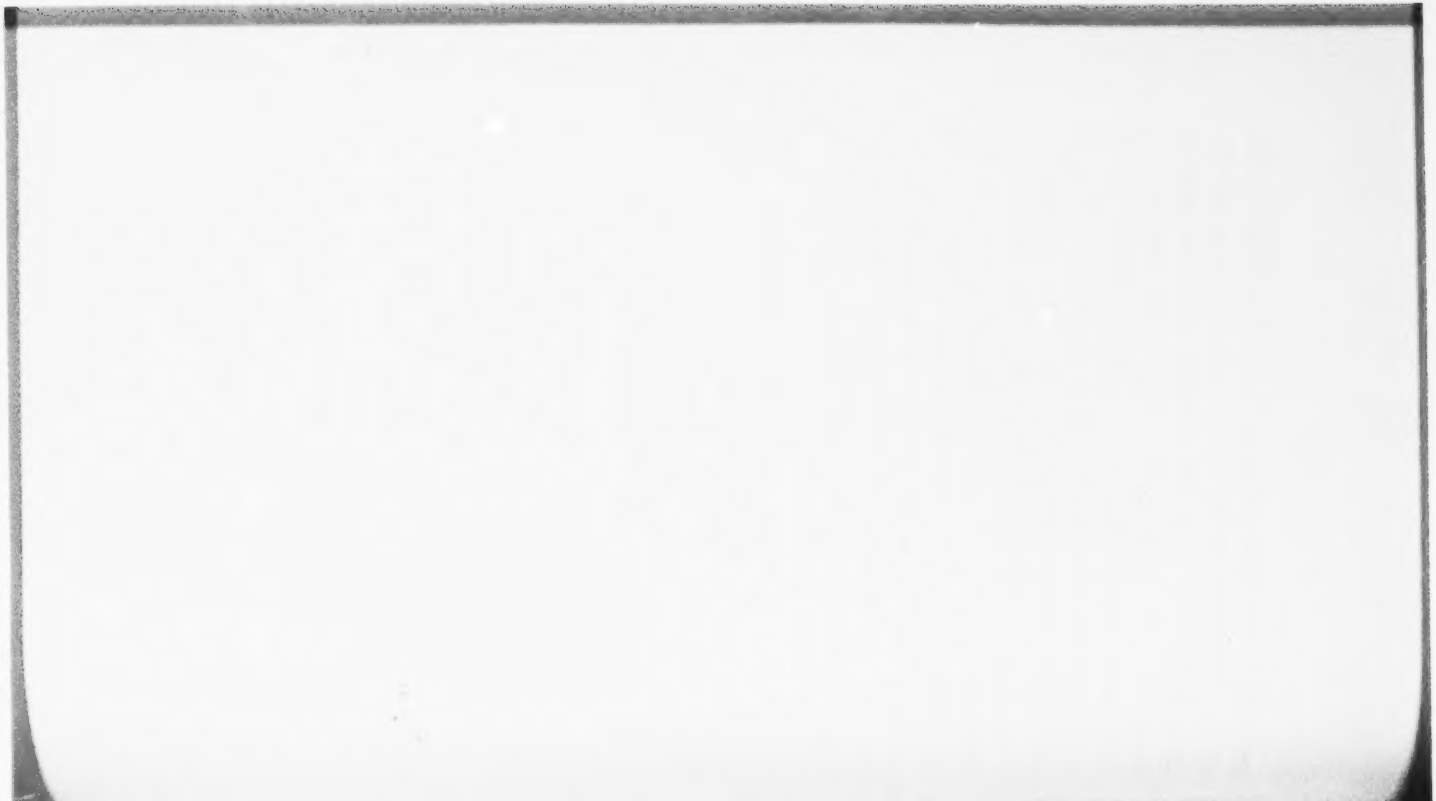
To our mind the subject is too plain to admit of argument, and it is respectfully submitted that the motions as made should be sustained.

Very respectfully,

ROB'T B. SMITH,
Attorney for the Defendant in Error.

Service admitted and copy received this 29th day of July, 1903.

FORBIS & EVANS,
Attorneys for the Plaintiff in Error.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 109.

THE BUTTE CITY WATER COMPANY, PLAINTIFF IN ERROR,

vs.

BEN BAKER.

POINTS AND AUTHORITIES IN REPLY TO BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM.

ROBERT B. SMITH,
Attorney for Defendant in Error.

J. E. HEALY,
Of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 13264

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 109.

THE BUTTE CITY WATER COMPANY, PLAINTIFF IN ERROR,

vs.

BEN BAKER.

Points and Authorities in Reply to Brief of Plaintiff in Error in Opposition to Motions to Dismiss or Affirm.

I.

In their brief, filed on the foregoing motions, counsel seem to argue that all that is necessary to raise a Federal question is to use the words "Federal question," and then one may argue anything and everything which may be tortured to have the semblance of such.

We contend that a party must rely upon a *named* provision of Federal law or of the Federal Constitution, which must be set forth specially as the basis of a right claimed thereunder or as the basis of a Federal right which is contravened by a State law in conflict with it.

II.

The case of Dillon *vs.* Mares shows by the record (which please see) the presentation of a question specially set forth and claimed under a provision of the Federal Constitution. This case was discussed by the supreme court of Montana because it was thus properly presented.

In Baker *vs.* Water Company the question of the validity of State laws under the State constitution was discussed, following a similar discussion in Purdum *vs.* Laddin.

But in this case the only reference to this provision of the Federal Constitution is found in the brief to which this is a reply. No place in the record is the matter set forth, nor was it thought of until the briefs in the case of Dillon *vs.* Mares were read by opposing counsel.

III.

In no event do we contend that the brief or argument of counsel are part of the record; this court has decided the contrary. But we do contend that the statement of the case and the assignment of errors in the State court are parts of the record as showing what questions were presented for review to the supreme court of Montana.

IV.

The question presented was one solely of evidence in the State court, as shown by the brief of the plaintiff in error.

"Furthermore, it is within the established power of the State to prescribe the evidence which is to be received in the

courts of its own government. Fong Yue Ting *v.* United States, 149 U. S., 698–729."

Adams *vs.* New York, No. 9 Adv. Shts., 376.

Respectfully submitted.

ROBERT B. SMITH,
Attorney for the said Ben Baker.

J. E. HEALY,
Of Counsel.

Service admitted and copy received this — day October, 1904.

W. W. DIXON,
FORBIS & EVANS,
Attorneys for Plaintiff in Error.

[Endorsed:] In the Supreme Court of the United States. No. 109. The Butte City Water Co., plaintiff in error, *vs.* Ben Baker. Points and authorities in reply to plaintiff in error. Robert B. Smith, attorney for Ben Baker. J. E. Healy, of counsel.